Supreme Court, U.S.
FILED
APR 9 1998
OFFICE OF THE CLERK

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEANETTE G. GARRISON, HLM, INC. (F/K/A HEALTHMASTER, INC.) AND CHRISTOPHER GARRISON

David E. Hudson*
HULL, TOWILL, NORMAN & BARRETT
SunTrust Bank Building
801 Broad Street, 7th Floor
P.O. Box 1564
Augusta, GA 30903-1564
(706) 722-4481

*Counsel of Record

Phillip A. Bradley
Barry J. Armstrong
LONG ALDRIDGE & NORMAN LLP
Suite 5300
303 Peachtree Street
Atlanta, Georgia 30308
(404) 527-4000

Counsel for Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison

April 9, 1998

QUESTION PRESENTED

Whether an employee at will who has not testified in, and was not a party to, a federal proceeding, but whose employment was terminated, has stated a claim upon which relief can be granted under 42 U.S.C. § 1985(2).

LIST OF PARTIES

The caption of the case contains the names of all parties. Respondent HLM, Inc. (f/k/a Healthmaster, Inc.) has no parent company, nonwholly owned subsidiaries, or affiliates to list pursuant to Rule 29.6.

TABLE OF CONTENTS

QUESTION PRESENTED ..... *i*

LIST OF PARTIES ..... *ii*

TABLE OF CONTENTS ..... *iii*

TABLE OF AUTHORITIES ..... *iv*

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION ... 6

A. There Is No Irreconcilable Conflict of Decisions Among the United States Courts of Appeals 6

B. *Morast v. Lance* Was Properly Decided .. 12

C. Petitioner Does Not Prevail Based Upon the Circuit Court Opinions Upon Which He Relies 19

D. Petitioner Failed to Plead Force, Intimidation or Threat Sufficiently 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 5

Bishop v. Wood, 426 U.S. 341 (1976) 17, 18

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 15, 16, 17

Chahal v. Paine Webber, Inc., 725 F.2d 20
(2d Cir. 1984) 20

David v. United States, 820 F.2d 1038
(9th Cir. 1987) 21

Georgia Power Co. v. Busbin,
250 S.E.2d 442 (Ga. 1978) 12, 13

Griffin v. Breckenridge, 403 U.S. 88 (1971) 15

In re New Haven Inclusion Cases, 399 U.S. 392,
(1970) 5

Irizarry v. Quiros, 722 F.2d 869
(1st Cir. 1983) 10, 11, 12,
21, 22

Keating v. Carey, 706 F.2d 377 (2d Cir. 1983) .. 25

Kimble v. D.J. McDuffy, Inc., 648 F.2d 340
(5th Cir. June 1981) (en banc),
cert. denied, 454 U.S. 1110 (1981),
overruled in part on other grounds
by Kush v. Rutledge, 460 U.S. 719 (1983) ... 7, 8, 9

Kush v. Rutledge, 460 U.S. 719 (1983). 7, 10, 14,
15, 20

McCord v. Bailey, 636 F.2d 606
(D.C. Cir. 1980), *cert. denied*,
451 U.S. 983 (1981) 9

Morast v. Lance, 631 F. Supp. 474
(N.D. Ga. 1986), *aff'd*, 807 F.2d 926
(11th Cir. 1987) 23, 24

Morast v. Lance, 807 F.2d 926
(11th Cir. 1987) ..... passim

Portman v. County of Santa Clara,
995 F.2d 898 (9th Cir. 1993) 11, 12, 19,
20, 22

Rode v. Dellarciprete, 845 F.2d 1195
(3d Cir. 1988) 22

Runyan v. Economics Laboratory, Inc.,
248 S.E.2d 44, 46 (Ga. App. 1978) 13

Rylewicz v. Beaton Services, Ltd.,
888 F.2d 1175 (7th Cir. 1989) 22

Taylor v. Foremost-McKesson, Inc.,
656 F.2d 1029 (5th Cir. Unit B Sept. 1981) ... 13

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 5

STATUTES

7 U.S.C. § 2041 *et seq.* 10

29 U.S.C. § 201 *et seq.* 21

29 U.S.C. § 651 *et seq.* 22

30 U.S.C. § 1923 19

42 U.S.C. § 1985(2) ..... passim

42 U.S.C. § 6971 19

42 U.S.C. § 9610 19

O.C.G.A. § 34-7-1 12

MISCELLANEOUS

Haddle v. Garrison, et al., Civil Action
File No. 96-RCCV-572 (Superior
Court of Richmond County, Georgia) 2

O'Neal v. Master Health Plan, Inc.,
No. 96-028 (S.D. Ga.) 5

Section 1985(2) Clause One and Its Scope,
70 Cornell L. Rev. 756, 757-59 (1985) 23, 25

No. 97-1472

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEANETTE G. GARRISON, HLM, INC. (F/K/A HEALTHMASTER, INC.) AND CHRISTOPHER GARRISON

The Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison, individually and as Trustee for certain trusts, respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioner filed this action in the district court asserting one federal claim under 42 U.S.C. § 1985(2) and several state law claims against Jeanette Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) ("HLM"), Christopher Garrison, individually and as Trustee of certain trusts, and others. The district court dismissed Petitioner's 42 U.S.C. § 1985(2) claim based upon the binding authority of *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987). The district court also dismissed Petitioner's state law claims after declining to exercise supplemental jurisdiction over the state claims.[1] The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on the authority of *Morast*.

---

[1] Petitioner did not appeal the dismissal of the state law claims. Petitioner refiled his state law claims in a state court action captioned *Haddle v. Garrison, et al.*, Civil Action File No. 96-RCCV-572 (Superior Court of Richmond County, Georgia). The Richmond County Superior Court subsequently granted summary judgment to all defendants on all claims asserted by Petitioner.

The district court dismissed Petitioner's 42 U.S.C. § 1985(2) claim before any significant discovery took place and the district court did not consider any evidence outside of the pleadings when ruling on the Motions to Dismiss. Accordingly, the relevant facts for purpose of Respondents' Motions to Dismiss are contained in Petitioner's Complaint[2].

From September 22, 1986 until approximately April 13, 1995, Petitioner was an employee of HLM. (R10-2.) On March 8, 1995, HLM and others were indicted in the United States District Court for the Southern District of Georgia. (R10-3.) In April 1995, Healthmaster Home Health Care, Inc. ("HHHC"), the wholly owned operating subsidiary of HLM, filed for protection under Chapter 11 of the bankruptcy code. In connection with the bankruptcy proceeding, most of the employees of HLM, including Petitioner, were transferred to HHHC. (R10-3.) The bankruptcy court appointed a trustee to oversee the affairs of HHHC. (R10-3.)

During the investigation that led up to the indictment of HLM and others, and the subsequent bankruptcy filing, Petitioner alleges he cooperated with federal agents. While Petitioner at one point alleges he "testified pursuant to subpoena before said grand jury," Petitioner later admits "his testimony was not actually taken due to the press of time." (R10-4.) Petitioner does

---

[2] Petitioner amended his Complaint to assert an additional state law claim which is not at issue in this appeal.

not allege he was a party to the criminal case brought against HLM and others, or any other federal proceeding; he only alleges he was to be a potential witness in the criminal case against others. (R10-4-5.)

On June 21, 1995, the President of HHHC, Respondent G. Peter Molloy, terminated Plaintiff's employment with HHHC. (R10-4, 16-3.) Petitioner alleged that Mr. Molloy, the President of HHHC, terminated Petitioner's employment as a part of a conspiracy with Respondents Jeanette Garrison, Dennis Kelly and HLM[3] "in order to effectuate retaliation against [Petitioner]." (Petition for Writ of Certiorari (hereinafter "Petitioner's Brief") at 6.) Petitioner does not allege that he was threatened with force or violence by any of Respondents or that the government ever investigated or charged any of Respondents with obstruction of justice.

Although the holdings of the district court and the court of appeals properly were based on allegations in Petitioner's Complaint, Petitioner improperly includes numerous factual allegations in his petition that are not part of the record and were not considered by the district court or the court of appeals in their rulings on the Motions to Dismiss. In particular, Petitioner references testimony by Robert Pittard and testimony and rulings in

---

[3] Christopher Garrison, individually and as trustee for certain trusts, is not named as a defendant in Petitioner's 42 U.S.C. § 1985(2) claim. Christopher Garrison was only named as a defendant in a single state law claim.

the case of *O'Neal v. Master Health Plan, Inc.*, No. 96-028 (S.D. Ga.) (Petitioner's Brief at 3-6). None of the references to Mr. Pittard and *O'Neal* is part of the record. This Court has repeatedly held that parties may only rely on, and the Court may only consider, information that is part of the record. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 486 n.3 (1986) (This Court must affirm or reverse upon the case as it appears on the record . . .."); *In re New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) (". . . could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case.").

Moreover, the testimony and rulings from *O'Neal* are not relevant in this case. The only party against which the plaintiff in *O'Neal* obtained a verdict was Master Health Plan, Inc. ("MHP"), which is not a party to this case. Petitioner did not allege that MHP was in any way involved in the termination of Petitioner's employment. Furthermore, in Petitioner's attempt to prejudice the Court with extraneous allegations, Petitioner conveniently omits that Mr. Pittard previously testified under oath contrary to the allegations in Petitioner's brief and that Mr. Pittard only changed his sworn testimony after he was caught embezzling funds by several of the Respondents.

REASONS FOR DENYING THE PETITION

A. There Is No Irreconcilable Conflict of Decisions Among the United States Courts of Appeals

On the question presented in this matter there is no conflict among the decisions of the United States Courts of Appeals. Petitioner seeks to portray such a conflict by ignoring all of the elements required to articulate a claim upon which relief can be granted under 42 U.S.C. § 1985(2) and focusing on a perceived disagreement between the courts as to one of those elements. Stepping back from the narrow question posited by Petitioner, and looking at the decisions of the courts of appeals in their entirety, Petitioner failed to state a claim upon which relief can be granted under any of those decisions.

The statute at issue is 42 U.S.C. § 1985(2), which provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . ..
>
> [I]n any case of conspiracy set forth in this section, if one or more persons engaged

> therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(2) and (3).

In *Morast v. Lance,* 807 F.2d 926, 930 (11th Cir. 1987), the Eleventh Circuit upheld the dismissal of the plaintiff's 42 U.S.C. § 1985(2) claim on three grounds. First, relying on the authority of the former Fifth Circuit in *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. June 1981) (*en banc*), *cert. denied*, 454 U.S. 1110 (1981), *overruled in part on other grounds by Kush v. Rutledge*, 460 U.S. 719, 723 (1983), the *Morast* court found that testimony before a federal agency was insufficient to satisfy the requirement that the conspiracy be related to testimony before a federal court. The former Fifth Circuit in *Kimble* explained the rationale for requiring that a witness seeking redress under 42 U.S.C. § 1985(2) actually testify before a federal court:

> Passage of the Ku Klux Klan Act was "motivated by a desire to prevent and punish acts of terror or intimidation that

threatened the attempt to create a political environment hospitable to equality." In light of the acts of violence that threatened the sanctity of federal courts, Congress meant Section 1985(2) to protect a party based on his physical presence while attending or testifying in federal court. In this case, no allegations were made that plaintiffs were injured because they attended or testified in federal court. Given the background of violence and direct intimidation prevalent at the time of the original passage of Section 1985(2), it would be anomalous to find, without any specific support in the legislative history, that Congress intended to create a federal tort remedy for an employer's economic use of public information relating to the filing of federal lawsuits. Section 1985(2) was not designed as a vehicle to remedy such allegedly tortious acts of employers against employees pursuing workmen's compensation or personal injury claims. Rather, it was intended to protect against direct violations of a party or witness's right to attend or testify in federal court.

Id. at 348 (citation omitted). The *Kimble* decision clearly reflects that Congress, in enacting 42 U.S.C. § 1985(2), was addressing particular federal interests, in this case the protection of persons attending and testifying in federal

court as witnesses or parties. Congress was not creating a general tort law applicable to the employer-employee relationship.

Second, the *Morast* court found the plaintiff's allegations of "force, intimidation, or threat" to be inadequate. Indeed, the Eleventh Circuit noted that the allegations did not provide "specific examples of acts to deter testimony or attendance by 'force, intimidation, or threat.'" *Id.* at 930 n.4. Again, looking to the legislative history is instructive:

> Section 1985(2) is derived from section 2 of the Ku Klux Klan Act of 1871. The Klan Act was induced by massive and frequently violent resistance in the Southern states to federal reconstruction and the inability or unwillingness of state governments to deal effectively with that violence. Racial equality and protection of civil rights were not the only reasons for enactment of the Klan Act, however. A major concern was restoration of civil authority and preservation of orderly government, including federal court ability to proceed without improper interference.

Kimble, 648 F.2d at 350 (Johnson, J. dissenting in part) (citations omitted). *See also McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). Again, Congress was not intending to encompass

employment disputes within the proscription of deterrence or retaliation unless it in fact involved force, intimidation or threats of the type prevalent in the reconstruction era.

Third, the *Morast* court held that the plaintiff had not alleged an injury cognizable under 42 U.S.C. § 1985(2). This is correct because the provision of 42 U.S.C. § 1985(2) at interest here was created to protect federal institutions and processes. A claim under the relevant provision must be institutionally linked to federal interests. *Kush v. Rutledge*, 460 U.S. 719, 724-25 (1983). The purpose of the Ku Klux Klan Act was not to "create an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others.'" *Id.* at 725.

Irizarry v. Quiros, 722 F.2d 869 (1st Cir. 1983), is not irreconcilably in conflict with *Morast*. In *Irizarry*, applicants for reemployment with potential employers which were required to be registered under the federal Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.*, brought an action under 42 U.S.C. § 1985(2). The plaintiffs each previously had initiated a federal action against the potential employers. Although the actions taken by the potential employers against these applicants are not fully recited in the First Circuit's opinion, it is reflected that the potential employers engaged in conduct sufficiently egregious that the First Circuit found the potential employers' conduct "was obviously designed to intimidate and deter." *Id.* at 871. The First Circuit also upheld an award of punitive damages and attorneys' fees,

and imposed double costs on appeal and attorneys' fees because of the potential employers' conduct. *Id.* at 872-73. Thus, in *Irizarry*, federally governed employers took action against applicants for reemployment as a direct result of those applicants' pursuit of actions in the federal courts. The federal interests involved were pervasive and were "institutionally linked" to the applicants' claim.

Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993), also is not irreconcilably inconsistent with *Morast*. While it is correct *Portman* held that retaliatory termination can be an injury for the purposes of 42 U.S.C. § 1985(2), that does not end the inquiry. The plaintiff in *Portman* was a public employee who was fired after he filed a federal court action against his employer. In his underlying federal court complaint the plaintiff asserted federal statutory and constitutional claims against his government employer. Even with these allegations, the Ninth Circuit specifically did not address whether the plaintiff had pleaded sufficiently all of the elements of a claim for relief under 42 U.S.C. § 1985(2). Left open were the issues of the existence of a conspiracy and whether the mere act of filing a federal court complaint triggered the protections of 42 U.S.C. § 1985(2). *Id.* at 910. Thus, the Ninth Circuit remanded the case for further proceedings.

Common to *Irizarry* and *Portman*, but not to *Morast*, was the implication of substantial federal interests. The plaintiff in *Morast*, like Petitioner, was a private employee who had not initiated an action in federal

court. Indeed, the plaintiff in *Morast*, like Petitioner, had not even testified as a witness in a federal court action. All that existed in *Morast*, as in this case, was a plaintiff's attempt to use 42 U.S.C. § 1985(2) to create a wrongful discharge claim for relief when no such claim existed under state law. Federal interests were not institutionally linked to the claim as they were in *Irizarry* and *Portman*.

While these courts of appeals may differ with respect to articulation of individual elements of the 42 U.S.C. § 1985(2) claim for relief, the overall result is the same. The courts of appeals require that significant federal interests, of a nature intended to be protected by Congress by the enactment of the Ku Klux Klan Act of 1871, must be implicated. An employer may not terrorize its employees through force, intimidation or threat for their assertion of federal interests in the federal courts. If those institutionally linked federal interests do not pervade, however, no claim for relief under 42 U.S.C. § 1985(2) has been stated.

B. *Morast v. Lance* Was Properly Decided

Petitioner alleged that his employer, HHHC, was a Georgia corporation with its principal place of business in Georgia, that Petitioner is a Georgia resident, and that all relevant acts took place in the State of Georgia. (R10-1-3.) Under Georgia law, Petitioner was an employee at will. *Georgia Power Co. v. Busbin*, 250 S.E.2d 442 (Ga. 1978); O.C.G.A. § 34-7-1.

If "'an employee's employment is terminable at will, the employer with or without cause and regardless of its motives, may discharge the employee without liability.'" *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029, 1031 (5th Cir. Unit B Sept. 1981) (quoting *Runyan v. Economics Laboratory, Inc.*, 248 S.E.2d 44, 46 (Ga. App. 1978)). Accordingly, "allegations and evidence as to improper motives for . . . discharge are legally irrelevant and present[] no issues . . . ." *Taylor*, 656 F.2d at 1031 (quoting *Georgia Power Co. v. Busbin*, 250 S.E.2d 442, 444 (Ga. 1978)).

The Eleventh Circuit in *Morast v. Lance*, 807 F.2d 926, 930 (11th Cir. 1987), recognized and held that the mere loss of employment at will is not sufficient to establish the actual injury element of a proper 42 U.S.C. § 1985(2) claim:

> [T]o make out a cause of action under § 1985(2) the plaintiff must have suffered an actual injury. Because Morast was an at will employee he had no constitutionally protected interest in continued employment. Therefore, Morast's discharge did not constitute an actual injury under this statute.

(citations omitted.)

As previously addressed, this holding is one articulation by the Eleventh Circuit of the requirement that there be a federal interest implicated in the underlying

conduct. Employment at will does not implicate such a federal interest.

The significance of the requirement that the injury have a nexus to federal interests was explained by this Court in *Kush v. Rutledge*, 460 U.S. 719 (1983), in which this Court determined that class-based animus was not an element of a 42 U.S.C. § 1985(2) action. In analyzing the five categories of outlawed conspiratorial activities in 42 U.S.C. § 1985, this Court stated:

> Three of the five broad categories, the first two and the fifth, relate to institutions and processes of the federal government — federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3).
>
> * * *
>
> The remaining two categories, however, encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern.

Id., at 724-25. This Court held that where class-based animus is required for the "remaining two categories" (*i.e.*, those involving state concerns), it is not required with respect to the three categories involving federal interests. *Id.*

The claim for relief at issue here is the first part of 42 U.S.C. § 1985(2) — federal judicial proceedings. Consistent with this Court's recognition in *Kush* that a claim for relief under this provision must implicate activity "institutionally linked to federal interests," the Eleventh Circuit in *Morast* rejected the notion that impact on an allegedly state protected interest in employment is a legally cognizable injury to person or property under 42 U.S.C. § 1985(2). To hold otherwise would negate what this Court in *Kush* and *Griffin v. Breckenridge*, 403 U.S. 88 (1971), sought to assure — not to "create an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others.'" *Kush*, 460 U.S. at 725. This Court achieved this result by requiring implication of a constitutionally protected equal protection interest (*i.e.*, class-based animus) when only state interests are affected. In the three other categories, including the category at issue here, a federally protected interest must be involved.

Moreover, this Court has held that at will employment is not a property interest protected under federal law. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court considered whether the termination of the employment of an assistant professor at a state university without a reason or a hearing was a violation of the professor's due process. In rejecting the professor's claim that he had a property interest in his employment protected by the federal Constitution, this Court held:

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

* * *

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of

> entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

Id. at 577-78 (footnote omitted) (emphasis in original).

This Court also addressed whether at will employment constitutes a federally protected property interest in *Bishop v. Wood,* 426 U.S. 341 (1976). In *Bishop*, a former police officer brought an action alleging that the termination of his employment without a hearing was a violation of due process. *Id.* at 344-45. Similar to *Roth*, this Court in *Bishop* rejected the police officer's claim that he had a property interest in continued employment protected by the federal Constitution and held:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however,

> the sufficiency of the claim of entitlement must be decided by reference to state law.

Id. at 344. In addition, this Court stated:

> In this case, the holding that as a matter of state law the employee "held his position at the will and pleasure of the city" necessarily establishes that he had *no* property interest.

Id. at 345 n.8 (emphasis in original).

The plaintiff in *Morast* was an employee at will under Georgia law and therefore had no property interest in continued employment protected by the federal law. As noted by the Eleventh Circuit,

> "[a]lthough we believe it is wrong to discharge a bank officer in retaliation for his reporting a banking violation, it is up to Congress, not the courts, to provide for an effective remedy."

Morast, 807 F.2d at 929.

The plain language of § 1985(2) requires that a plaintiff establish injury "in his person or property." Given the context of what fomented passage of the Ku Klux Klan Act, it is understandable that bodily injury and property damage were the types of injuries being addressed. Violence — or as is used earlier in § 1985(2),

force, intimidation or threats — was the concern. Adverse employment actions were not the type of retaliation at issue in the Ku Klux Klan Act.

Congress knows full well how to prohibit adverse actions taken in the terms and conditions of employment when it so desires. There are numerous examples of statutes in which Congress has created remedies against a person (not just an employer) who interferes with another person's employment in retaliation for assisting the government in enforcement proceedings. Such remedies are contained, for example, in the Solid Waste Disposal Act, 42 U.S.C. § 6971, CERCLA, 42 U.S.C. § 9610, and the Surface Mining Control Act, 30 U.S.C. § 1923. Congress did not include any language in 42 U.S.C. § 1985(2) protecting against adverse employment actions. Instead, 42 U.S.C. § 1985(2) provides redress for injury "to person or property."

Morast thus was correctly decided by the Eleventh Circuit. This is not to say Petitioner is without a remedy if he can show his employment improperly was terminated; that remedy just is not under 42 U.S.C. § 1985(2).

C. Petitioner Does Not Prevail Based Upon the Circuit Court Opinions Upon Which He Relies

Petitioner relies heavily on the decision of the Ninth Circuit in *Portman v. County of Santa Clara*, 995

F.2d 898 (9th Cir. 1993).[4] (Petitioner's Brief at 10-12.) However, Petitioner's claim also would have been dismissed under the Ninth Circuit's interpretation of 42 U.S.C. § 1985(2). This is because the Ninth Circuit requires that there be injury to a party in a federal court proceeding. It is this requirement that brings *Portman* within the policy articulated in *Kush v. Rutledge* requiring a federally implicated right, but just from a different approach than articulated by the Eleventh Circuit in *Morast*.

In *Portman,* the plaintiff previously had brought an action in federal court. In his 42 U.S.C. § 1985(2) claim, the plaintiff asserted that his employment was adversely affected in retaliation for his bringing of the federal action. *Id.* at 909. The Ninth Circuit specifically pointed out that the elements for a 42 U.S.C. § 1985(2) action for witness intimidation are somewhat different than for other 42 U.S.C. § 1985(2) claims, citing to *Chahal v. Paine Webber, Inc.*, 725 F.2d 20 (2d Cir. 1984). In *Chahal*, the court reversed a grant of summary judgment in a 42 U.S.C. § 1985(2) action. The court did so because the plaintiff in the 42 U.S.C. § 1985(2) action had presented sufficient facts that intimidation of a witness in the plaintiff's underlying federal action had caused the plaintiff injury in connection with the underlying federal action. *Id.* at 20.

---

[4] In an apparent typographical error, Petitioner mistakenly refers to the Appellant in *Portman* as "*Portland.*"

The Ninth Circuit made the requirement of injury to a party in an underlying action absolutely clear in *David v. United States,* 820 F.2d 1038 (9th Cir. 1987). In *David*, the 42 U.S.C. § 1985(2) plaintiff claimed she had been discharged from her employment because of her acting as a witness in a separate federal court proceeding (to which the 42 U.S.C. § 1985(2) plaintiff was not a party). The Ninth Circuit held:

> David [the 1985(2) plaintiff] has not alleged how she has been injured by her testimony in *Parodi* [the separate federal court proceeding] or her failure to appear in court. Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the *litigant* was hampered in being able to present an effective case. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under § 1985(2).

Id. at 1040 (emphasis in original) (citation omitted).

In *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983), it also was specifically noted that the "[p]laintiffs have proved that they were denied reemployment because they previously had instituted legal actions to vindicate their federal rights." The plaintiffs previously had filed actions against the defendants under the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, or the

Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq. Irizarry,* 722 F.2d at 870; *see also Rylewicz v. Beaton Servs., Ltd.,* 888 F.2d 1175, 1180 (7th Cir. 1989) ("Congress intended to provide a damage remedy only for litigants whose right to pursue a claim in federal court has been hindered by a conspiracy. . . . Otherwise the term 'witness' would have been contained in those remedial provisions."); *cf. Rode v. Dellarciprete,* 845 F.2d 1195, 1206-07 (3d Cir. 1988).

Unlike the plaintiffs in *Irizarry* and *Portman*, Petitioner was a potential witness, not a party, in the separate federal litigation. Because he was not a party to the separate federal proceeding, Petitioner's ability to present an effective case in federal court was unaffected, and he therefore has suffered no "actual injury."

Moreover, there is no allegation that Petitioner was in any way hindered or prevented from cooperating with the government and testifying. Thus, Petitioner was not injured in his ability to testify. *Rylewicz*, 888 F.2d at 1181 ("There has been no allegation that he was in fact hampered from testifying 'freely, fully, and truthfully,' in the words of Section 1985(2) . . .. Plaintiffs have simply not pointed to an injury or deprivation within the scope of Section 1985 . . .."). Since it is the interest in being able to litigate a party's case fully in the federal courts that constitutes the protected federal interest under *Irizarry* and *Portman*, only parties hampered in their ability to litigate fully their federal actions have standing under 42 U.S.C. § 1985(2). Because Petitioner had no such federal interest

implicated and was not injured, it was proper to dismiss his 42 U.S.C. § 1985(2) claim.

D. Petitioner Failed To Plead Force, Intimidation or Threat Sufficiently

Under 42 U.S.C. § 1985(2), two or more persons must conspire to deter testimony by use of "force, intimidation or threat." When the Ku Klux Klan Act was passed in 1871, Congress intended that the statute inhibit members of the Klan from using lynchings, whippings and other acts of violence to obtain political control in the South. *See Section 1985(2) Clause One and Its Scope,* 70 Cornell L. Rev. 756, 757-59 (1985). Paragraphs 18, 19, and 20 of Petitioner's First Amended Complaint, which purport to set out the force, intimidation or threat, focuses solely on the termination of Petitioner's employment.

The Eleventh Circuit held in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), that such allegations are insufficient as a matter of law to establish "force, intimidation or threat." In *Morast*, the plaintiff's employment was terminated allegedly for the plaintiff's cooperation with federal regulators. In *Morast*, the plaintiff alleged:

> [I]n conclusory terms, drawn from the text of the statute, . . . the defendants conspired to deter, by force or intimidation, plaintiff as a witness. The only concrete actions complained of were that the defendants

> were "angry, upset and vindictive" toward the plaintiff; that they questioned the plaintiff about the source of leaks to the press about the Comptroller's investigation, implying that plaintiff was a possible source; and, that plaintiff was excluded from board meetings and given a decreased work load.

Morast v. Lance, 631 F. Supp. 474, 479 (N.D. Ga. 1986), *aff'd*, 807 F.2d 926 (11th Cir. 1987). As one of its bases for granting defendants' motion to dismiss, the district court stated: "Plaintiff's complaint is essentially void of the factual allegations necessary to support a claim under section 1985(2)." *Id.*

The Eleventh Circuit, in affirming the district court's grant of the motion to dismiss on this particular ground, stated:

> . . . Morast has not alleged that the defendants conspired to stop him from attending or testifying at the hearing by "force, intimidation, or threat." Morast contends only that defendants retaliated against him with anger and vindictiveness, extensive questioning regarding leaks to the press, exclusion from board meetings, and a decreased workload.[4]

> [4] The remainder of Morast's list of "retaliations" are conclusory in nature and are not specific examples of acts to deter testimony or attendance by "force, intimidation, or threat."

Morast, 807 F.2d at 930.

In one of the few decisions other than *Morast* to address what satisfies the "force, intimidation, or threat" requirement, Judge Meskill of the Second Circuit strenuously argued that "force, intimidation or threat" should "require evidence of physical force, threats of violence or similarly malevolent acts." *Keating v. Carey*, 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting); *see also Section 1985(2) Clause One and Its Scope*, 70 Cornell L. Rev. 756, 776-77 (1985) ("Judge Meskill's opinion in *Keating* offers the most promising approach" to follow the legislative intent behind 42 U.S.C. § 1985(2) without infringing on traditional state law concerns). Accordingly, given that Petitioner has pleaded even less than that held legally insufficient in *Morast*, Petitioner has failed to plead sufficiently "force, intimidation or threat," and his Complaint properly was dismissed.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David E. Hudson*
HULL, TOWILL, NORMAN & BARRETT
SunTrust Bank Building
801 Broad St., 7th Floor
P.O. Box 1564
Augusta, GA 30903-1564
(706) 722-4481

Phillip A. Bradley
Barry J. Armstrong
LONG ALDRIDGE & NORMAN LLP
Suite 5300
303 Peachtree Street
Atlanta, Georgia 30308
(404) 527-4000

Counsel for Respondents Jeanette G. Garrison, HLM, Inc. (f/k/a Healthmaster, Inc.) and Christopher Garrison

***Counsel of Record**

April 9, 1998